

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 14, 1999

IN RE: BELL SOUTH TELECOMMUNICATIONS,)	
INC.'S ENTRY INTO LONG DISTANCE)	Docket No.
(INTERLATA) SERVICE IN TENNESSEE)	97 - 00309
PURSUANT TO SECTION 271 OF THE)	
TELECOMMUNICATIONS ACT OF 1996)	

**ORDER DENYING BELL SOUTH TELECOMMUNICATIONS, INC.'S
MARCH 10, 1999, MOTION TO DEFER**

On March 10, 1999, the Tennessee Regulatory Authority ("TRA" or "Authority") issued a Final Conference Agenda for its regularly scheduled March 16, 1999, Authority Conference. This matter, TRA Docket No. 97-00309, was listed as Agenda Item No. 1 and was scheduled to be deliberated by the Directors of the Authority on March 16, 1999. The presence of this matter on the Authority's Final Conference Agenda provided notice that the Directors of the Authority were prepared to and planned to deliberate this case on the merits at its March 16, 1999, public Conference.

On March 10, 1999, BellSouth Telecommunications, Inc. ("BellSouth") filed a *Motion to Remove Item No. 1 From March 16, 1999, Final Conference Agenda*. The intervenors filed responses to BellSouth's motion. This matter is before the Authority on *BellSouth's Motion to Remove Item No. 1 From March 16, 1999, Final Conference Agenda*, referred to hereinafter as the Motion to Defer. After careful consideration, the Motion to Defer is denied for the reasons set forth below.

I. TRAVEL OF THE CASE

Prior to the passage of the federal Telecommunications Act of 1996 (the “Act”) in February of 1996, Bell Operating Companies (“BOCs”), such as BellSouth, were prohibited from entry into the in-region long distance (interLATA) market. Under this prohibition, BellSouth could not provide long distance services in Tennessee. Section 271 of the Act, however, provides that BOCs may gain entry into the in-region long distance market by meeting the criteria set forth therein and obtaining the approval of the Federal Communications Commission (“FCC”). Before making any determinations under Section 271 of the Act, the FCC must consult with the State commission of the State that is the subject of the application. 47 U.S.C. § 271(d)(2)(B).

Cognizant of their consultative role under Section 271 of the Act, and in an effort to hasten the development of competition in the telecommunications market in Tennessee, on March 4, 1997, at a regularly scheduled Conference, the Directors of the Authority instituted a Formal Inquiry (the “Inquiry”) for the purpose of determining the compliance of BellSouth with the criteria and procedures set forth in the Act for entry into the in-region long distance (interLATA) markets in Tennessee.¹

Under the Act, the decision of when to apply for Section 271 approval with the FCC is in the sole discretion of the BOCs. BellSouth voluntarily agreed to provide the TRA at

¹ The Order Instituting Formal Inquiry and Adopting Procedure was entered on March 21, 1997. It should be noted here that on December 17, 1996, the Directors of the TRA requested the TRA Staff to conduct an informal investigation into BellSouth’s entry into the long distance market in Tennessee. Comments received from the Consumer Advocate Division, BellSouth, and certificated facilities-based providers of local telephone service in Tennessee were included in the TRA Staff’s Informal Investigation and Report, which was submitted to the Directors on February 18, 1997.

least ninety (90) days' advance notice before filing its Section 271 application with the FCC. On December 12, 1997, BellSouth filed its Notice of Filing, together with supporting documentation and testimony, with the TRA. BellSouth filed its Statement of Generally Available Terms and Conditions ("SGAT") on January 16, 1998. A hearing on the merits was held on May 5-7, May 11-15, and May 27-28, 1998.

II. POSITIONS OF THE PARTIES ON THE MOTION TO DEFER

BellSouth set forth four (4) reasons in support of its Motion to Defer. First, BellSouth argued that consideration of this matter on the merits is premature until the conclusion of the Petition to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements, TRA Docket No. 97-01262. Second, BellSouth contended that its supplemental filing of July 22, 1998, and the issues surrounding this filing, namely the opportunity for both AT&T Communications of the South Central States, Inc. ("AT&T") and NEXTLINK Tennessee, L.L.C. ("NextLink") to respond thereto, render this matter not ripe for a decision on the merits. Next, BellSouth maintained that the Authority should not render its decision in this matter until the intervenors have the opportunity to consider, submit, and/or respond to the deposition of Mr. William Denk regarding BellSouth's Tennessee PCS study. Finally, BellSouth asserted that the Authority should defer its ruling until such time as the parties have reduced to writing the removal of settled issues from this contested case, as resolved at the November 19, 1998, Status Conference.

On the other hand, the intervenors steadfastly maintained that this case is ripe for disposition by the Authority. It is the intervenors' position that none of the reasons submitted by BellSouth is a valid justification to delay this proceeding.

III. DISCUSSION

BellSouth's first reason for requesting a deferral in this matter rests on the fact that the *Petition to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements*, TRA Docket No. 97-01262 (the "Permanent Prices Case"), is pending final resolution. Based on the entire record in this 271 proceeding, the Directors find this reason without merit and totally contradictory to prior positions of BellSouth in this very proceeding.²

Since this 271 case was commenced, BellSouth has consistently and aggressively argued that the Authority could, and in fact should, proceed with this 271 case notwithstanding the posture of the Permanent Prices Case. In motions filed in January of 1998, AT&T and NextLink contended that BellSouth's 271 filing should be either dismissed or delayed until the conclusion of the Permanent Prices Case. In opposition to these motions, BellSouth argued that "there is no reason why the TRA should delay consideration of BellSouth's SGAT or its entry into long distance until the Permanent Price proceeding has been completed." *BellSouth's Proposed Statement of Issues and Comments, January 20,*

² The Authority issued its *Interim Order on Phase I of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements*, TRA Docket No. 97-01262 (the "Phase I Order") on January 25, 1999. On that same date, the United States Supreme Court issued an opinion that may have a substantive effect on the Phase I Order. The parties have filed motions to reconsider and/or clarify and said motions are currently pending for resolution.

1998, at 5-6.³ BellSouth urged the TRA to approve the terms and conditions of the SGAT “subject to the condition and understanding that the final prices approved by the TRA in the Permanent Price proceeding will promptly be incorporated into the SGAT.” *Id.* See also *Transcript of Proceedings, Docket No. 97-00309, January 22, 1998, Status Conference at 24*.⁴

BellSouth argued this position as late as the 271 hearing on the merits. See *Transcript of Proceedings, Docket No. 97-00309, May 6, 1998, Hearing, Vol. IIB at 106* (“As soon as [the permanent prices] are established by the TRA, it says in that SGAT that those prices will be replaced by the permanent prices that’s established by the TRA.”) (Testimony of BellSouth witness Al Varner). BellSouth’s most recent allegation concerning an effort by competing local exchange companies to delay its 271 application was made in a November 17, 1998, filing. See *BellSouth’s Response to Objections to BellSouth’s Supplemental Notice of Filing at 3*.

BellSouth opined in January of 1998 that “it is not in the interest of Tennessee consumers for this critical proceeding to be delayed” because of revisions in the Permanent Prices Case’s schedule.⁵ *BellSouth Proposed Statement of Issues and Comments, January*

³ BellSouth maintained that “BellSouth firmly believes that the recently revised schedule in the Permanent Price Docket should not result in a delay in the previously-established schedule in the 271 proceeding. . . . [I]t is not in the interest of Tennessee consumers for this critical proceeding to be delayed.” *BellSouth’s Proposed Statement of Issues and Comments, January 20, 1998, at 6*.

⁴ The Authority denied both AT&T’s motion to dismiss and NextLink’s motion to defer.

⁵ It should be noted that the revisions in the schedule in the Permanent Prices Case were due to BellSouth filing a motion for leave to file surrebuttal testimony, including revised exhibits and a revised cost study, after the hearing on the merits was well underway. See *Order Approving Report and Recommendations of the Hearing Officer filed January 9, 1998, and Granting BellSouth’s Motion for Leave to File Surrebuttal Testimony*.

20, 1998, at 6. BellSouth has, since January of 1998, considered 271 a critical proceeding for Tennessee consumers, and has failed to adequately identify any occurrence that would render it less so today. Given BellSouth's adherence to its position, for well over a year, that the 271 proceeding should not be delayed, the Authority now finds BellSouth's late conversion here unpersuasive. At this stage of the proceeding, there exists no material reason to justify delaying the deliberations in Docket No. 97-00309 until the conclusion of Docket No. 97-01262.

BellSouth's second argument concerns the supplemental filings. On July 22, 1998, and subsequent to the hearing, BellSouth filed supplemental evidence in support of its 271 application. In August of 1998, both AT&T and NextLink objected to BellSouth's supplemental filing. BellSouth filed a response to the objections on November 17, 1998. At a December 15, 1998, Authority Conference, the parties reached a verbal agreement regarding BellSouth's supplemental filing and were directed to submit the agreement in writing as soon as possible in order to avoid any further delay in this matter. Under the agreement BellSouth's supplemental filing would become a part of the evidentiary record subject to an opportunity for the intervenors to rebut the same. The parties have had at least three (3) months to submit the agreement to the Authority. To date, no such agreement has been submitted. Whether to further delay this matter until such time as the parties submit an agreement or a resolution is made by the Authority is in the sole discretion of the Authority.⁶ Since the Authority may consider the supplemental filing and any responses thereto after

⁶ The Authority has attempted to schedule a time to resolve the stalemate surrounding this agreement, but the parties have been unsuccessful in agreeing to a mutually satisfactory time.

deliberating on the evidentiary record as it existed at the conclusion of the hearing, no prejudice to any party would result from the Authority proceeding to deliberations.

Next, BellSouth cites the Denk deposition to justify a deferral. Like the two (2) before it, this reason is also unconvincing. First, BellSouth has not affirmatively asserted that it is relying on the Tennessee PCS study in support of its 271 filing. See November 19, 1998, Status Conference Transcript at 6-7 (“So it may be that we will not rely upon PCS. . . . So right now we’re not sure that we’re going to be relying upon that study in support of our application.”). Second, the deposition was requested by the intervenors, not BellSouth. Thus, arguably, any prejudice caused by deliberating this matter at this stage with respect to Mr. Denk’s deposition would be to the detriment of the intervenors, not BellSouth. Moreover, as with the supplemental filings, the Authority could consider the PCS study and Mr. Denk’s deposition subsequent to deliberations on the evidentiary record as it existed at the conclusion of the hearing.

Finally, perhaps the least meritorious of BellSouth’s contentions for delay involves outstanding negotiations concerning the terms of a stipulation. Various issues were “settled” by the parties and removed from contention at a November 19, 1998, Status Conference.⁷ The parties were directed to memorialize the agreements in writing and submit them to the Authority. To date, no such agreements have been submitted. This is of little consequence to the remaining contested issues in this case. If the parties fail to reduce to writing the terms of

⁷ At the November 19, 1998, Status Conference, the parties present agreed to resolve checklist items 3, 7(1) and 9, consistent with their comments.

the settlement, then the Authority may deliberate those previously settled issues at a later time.

IV. CONCLUSIONS

As noted earlier, BellSouth filed its 271 Notice of Filing with the Authority in December of 1997, and its SGAT in January of 1998. As accurately articulated by AT&T, BellSouth has argued vehemently for two (2) years, time after time, that this case should not be delayed and urged, in spite of the substantial volume of the record ⁸, a speedy resolution. See AT&T Comments on BellSouth's Motion to Remove Item No. 1 From March 16, 1999, Final Conference Agenda at 5-6. After many conferences, several technical workshops, a discovery period, and the submittal of pre-filed testimony, an extensive hearing on the merits was held. Subsequent to the hearing, the parties submitted post-hearing briefs and proposed findings of fact and conclusions of law. The record is ripe.

While the Authority recognizes that BellSouth's positions and offerings with respect to the checklist may change over time, the Authority is also mindful that in order to either timely approve BellSouth's 271 application, affording due process to all parties, or to timely provide guidance to BellSouth (a "roadmap") with respect to identified deficiencies, it is both necessary and essential to act upon the current evidentiary record. To do otherwise, may place both the parties and the Authority in an extremely awkward evidentiary posture at a later time.

⁸ The record in this case now exceeds approximately 40,000 pages.

Let us assume solely for the purposes of BellSouth's Motion to Defer that the Directors of the Authority are not of the opinion that BellSouth is in compliance with Section 271 of the Act, based on the record as it currently stands. Then, in order to provide BellSouth with an opportunity to modify and/or supplement its 271 submission with an aim towards 271 compliance, by correcting deficiencies identified by the Authority, the Authority should act now on the evidentiary record before it.

Depending upon the action taken by the Authority on the merits of this case, three (3) of the outstanding matters/issues referenced by BellSouth in its Motion to Defer, the supplemental filings, the Denk deposition, and the "settlement" agreement, could be resolved in short order.

The presence of this matter on the Authority's Final Conference Agenda for March 16, 1999, provided notice that the Directors of the Authority were prepared to and planned to deliberate this case on the merits at its March 16, 1999, Authority Conference. BellSouth has not come forward with any information that the Authority was not privy to and fully aware of when the Authority issued its March 16, 1999, Final Conference Agenda. Further, in its motion, BellSouth did not cite any prejudicial harm that it might incur if the Authority proceeded to deliberations.

Having carefully considered the arguments of the parties with respect to BellSouth's Motion to Defer, the Directors of the Authority voted 2 to 1 to deny the motion.⁹ Further, the

⁹ Director Kyle did not join in the position of the majority. Director Kyle stated that "I would be in favor of the Authority deferring any consideration on the merits but not for the reasons" put forth by BellSouth. *March 16, 1999, TRA Conference Transcript at 18-19, 20.*

Directors unanimously appointed Chairman Melvin Malone to preside as Hearing Officer for a decision on the merits or any other action considered appropriate by the Hearing Officer.

IT IS THEREFORE ORDERED THAT:

1. BellSouth's *Motion to Remove Item No. 1 From March 16, 1999, Final Conference Agenda* is denied.

2. Chairman Melvin J. Malone is hereby appointed as Hearing Officer for the purpose of rendering a decision on the merits or taking any other action considered appropriate by the Hearing Officer.

3. Any Party aggrieved by the decision of the Tennessee Regulatory Authority in this matter may file a Petition for Reconsideration with the Authority within ten (10) days of the date of this Order.


CHAIRMAN MELVIN J. MALONE

* * *

DIRECTOR SARA KYLE


DIRECTOR H. LYNN GREER, JR.

ATTEST:


Executive Secretary

* Director Kyle did not join in the position of the majority. See Footnote 9 above.